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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 405

CARLOS EUGENE TAYLOR,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE AND SUPPORTING BRIEF

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 405

CARLOS EUGENE TAYLOR,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent

PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE SUPREME COURT OF TENNESSEE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Carlos Eugene Taylor, respectfully prays for a writ of certiorari herein to review a certain final decision of the Supreme Court of the State of Tennessee, being the highest court of that State, in the above-entitled action, the opinion and decision of said Court having been rendered and filed July 15, 1950.

The time in which to apply for a writ of certiorari herein was extended to and including November 10, 1950, by Mr. Justice Stanley Reed by an order issued September 29, 1950.

The transcript of the record in this case, including the proceedings in the Supreme Court of Tennessee, has been filed herein in accordance with Rule 38 of this Court.

I

Jurisdiction

Jurisdiction is invoked under the provisions of the Act of February 13, 1925, as amended (United States Code, Title 28, Section 2101), and Rule 38 of this Court.

II

Principal Question Involved

The principal question involved is whether a confession obtained from petitioner Taylor, after he had been arrested, imprisoned and denied the privilege of consulting counsel, was made by him freely and voluntarily or as the result of coercion and duress that violated the due process clause of the Fourteenth Amendment to the Federal Constitution.

III

Summary Statement of Matters Involved

Your petitioner, Carlos Eugene Taylor, was jointly indicted and convicted with one William Louis York, Jr., under two counts of an indictment charging larceny and receiving stolen property and sentenced to a prison term of three years. The indictment originally was in four counts but two of them, charging conspiracy and fraudulent breach of trust, were dismissed on motion of the State at the beginning of the trial (R. 1-6).

Taylor alone appealed and his judgment of conviction was affirmed by the Supreme Court. Its opinion appears at Page 209, *et seq.* of the record.

William Louis York, Jr., was an employee of the Perkins Oil Company, Memphis, Tennessee, did clerical work for that company and was being trained for a position as man-

ager under the G. I. Bill. One of his duties was to obtain the weekly payroll from the bank. On May 27, 1949, he received a check drawn upon the Union Planters National Bank & Trust Company, signed by the vice-president of the oil company and made payable to W. L. York, Jr., Agent, in the amount of $4,497.43. He endorsed this check, presented it to the bank and received the money from the bank teller but did not deliver the proceeds to his employer.

In the afternoon of the same day, he called the vice-president of the Perkins Oil Company, who had signed the check, and reported that he had been held up and robbed. This call was made from a grocery store in South Memphis. Upon instructions, he awaited the arrival of officers, to whom he stated he had been held up by two unidentified white men. He was detained by the police officers overnight and questioned by them at the police station but was released the following morning (R. 7-9).

The police officers, however, continued to investigate the claimed payroll robbery and about two weeks before York was arrested a second time two of the police investigators, in the presence of York, said *"put him on the rack and he will talk"* (R. 84).[1]

On the afternoon of July 18, 1949, York was again taken into custody of the Memphis police ostensibly "for investigation" on a forgery charge, having no connection with the claimed payroll robbery, which was not mentioned in connection with his arrest, this being made without a warrant (R. 10, 12, 17, 19).

York was arrested about 4:00 or 4:30 P. M. on the date above stated and not taken before a committing magistrate until 2:30 P. M. July 20, 1949 (R. 131, 132).

About 7:00 o'clock on the night of York's arrest one of the police officers, Lt. Huddleston, visited Mrs. York at her

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[1] There is no denial of the testimony on this point.

home, spent about three hours with her and confronted her with the things they had against her husband and requested that she and York aid them in getting something on petitioner Taylor. On the following morning Lt. Huddleston returned to the home of Mrs. York, carried her to the police station and she spent the day as directed by the police officials in their effort to get petitioner, so doing in order to help her husband. Both Mr. and Mrs. York were advised by the police officers that it would be easier on York if he made a confession implicating petitioner in the alleged payroll robbery, that unless he confessed he would not only be prosecuted on that charge but also for forgery. York confessed. He was not prosecuted for forgery. His first confession implicated petitioner (R. 16, 19, 21). Mrs. York, when she went to the police station, was allowed to see her husband. She was very much upset and "crying". As part of the pressure put on York to obtain a confession, he was told by the officers that unless he confessed, certain moral indiscretions on his part, discovered by the police in their investigation, would be disclosed to his wife (R. 16, 19, 20, 21, 31, 34-35, 80).

In the belief that it would make it easier on her husband, a belief induced by assurances of the police officers (R. 34, 36), and after informing her husband of what she was doing (R. 38), Mrs. York called petitioner over the telephone advising him that her husband was in jail and made an engagement to see him at Thompson's Restaurant in Memphis and there sought to borrow money from him to pay rent and to buy food for her baby. Petitioner only had $7.00 or $8.00 in his pocket, which he offered to loan her but she did not take that amount and he promised to obtain or let her have funds later in the day. She reported to the police station and was instructed by the officers to make another appointment with petitioner. This she did, meeting

him at the Hitching Post, a cafe. In the meantime petitioner had gotten $50.00 from his restaurant which he planned to let her have when they met at the Hitching Post. He had not met her at any place previous to that day but knew her husband, who was sometimes a customer at his restaurant. Petitioner and Mrs. York met at the Hitching Post about 5:00 o'clock in the afternoon and petitioner was there arrested by the police officers, this being in accordance with their plan in which Mrs. York was aiding. Both petitioner and Mrs. York were taken by the police officers to the police station and into the office of Chief Inspector Hinds (R. 34, 35, 36, 50, 51, 88, 89).

In her distress and her eagerness to help her husband, Mrs. York, using her own language, was willing to be used as "bait" by the police to get petitioner (R. 200).

Petitioner and Mrs. York, when they arrived at the police station in custody of the officers, were taken into the office of Inspector Hinds who asked petitioner what he knew about "this payroll faked holdup". When petitioner responded that he knew nothing about it, the Inspector read him a statement, purporting to have been made by York, which incriminated petitioner. He denied that he was involved in the matter and refused to make a statement. Thereupon, the Inspector asked him, "do you want us to get it the hard way?" (R. 88, 89).

Thereafter petitioner was taken back to a cell and when put in the cell requested the privilege of calling his attorney, repeating this request several times (R. 90). After being confined in that cell for several hours, he was again taken into the office of Inspector Hinds. York was interrogated in petitioner's presence and when his statement was completed the officers asked petitioner if he wanted to make a statement. When he replied in the negative Inspector Hinds

and Chief Armour told him that it would be better for him if he did (R. 91).

Later petitioner's wife and child were brought to the police station and Chief Armour requested her to tell petitioner to go ahead and confess, telling her that he would get less time if he would do so. Inspector Hinds also urged him to make a statement and in response to his request for a lawyer said: "A lawyer won't do you any good". So did Commissioner Boyle (R. 83, 91, 92, 93).

Mrs. Taylor was also told in the presence of her husband that a lawyer would not do him any good and that it would would be easier on him if he confessed (R. 99, 100).

Petitioner finally yielded to the pressure put upon him and, in order that his wife and child might go home, signed the incriminating statement introduced in evidence but pled "not guilty" when taken before a committing magistrate the next day and repudiated this statement at the trial (R. 179, 180, 181, 182, 189).

The State introduced two witnesses at the preliminary investigation to determine the admissibility of the confessions. One of these, Lt. Lewis, had not talked with York before he made a statement (R. 48), and had not talked to Mrs. York (R. 51), but was informed by one of the other officers of the prearranged arrest of Taylor (R. 52). Lt. Lewis was present when York's second statement was made in the presence of petitioner and when the latter signed the confession admitted in evidence (R. 116, 124).

With respect to petitioner's request for counsel, Lt. Lewis thus testified:

> "Q. Now, Mr. Lewis, the last—at least three or four or possibly six times, from the time you brought Mr. Taylor, from the time you brought him to the police station in the presence of Mr. York, and in the presence of his wife, he made a request that he wanted to get in touch with his lawyer?

A. I didn't hear that.
Q. You wouldn't say he didn't make that request?
A. No.
Q. You don't say he did not make that request?
A. No, I didn't hear him."

(R. 59)

The other witness testifying for the State at the preliminary investigation of the admissibility of the confession was Edward M. Knoff, a business man and a member of the Shelby County Grand Jury, who was one of several persons invited to hear and witness the confessions (R. 152).

Knoff testified that he did not know what questioning of Taylor and his co-defendant had taken place before he arrived, that he was at the police station about thirty minutes, that petitioner stated he wanted to see his lawyer but that the first time he heard him make this statement was after he had signed the confession (R. 74). Knoff testified in one breath that Mrs. Taylor was not there when petitioner asked for his lawyer and in the next that this request was made "after his wife arrived" (R. 74).

Knoff further testified that everything that happened with respect to the admonition or advice given petitioner as to his constitutional rights was included in the written confession and that nothing was said with respect to Taylor's rights except what appears in the statement (R. 76, 77). There is no reference to petitioner's right to consult a lawyer in his statement or confession (R. 127-129).

Petitioner made no statement until the arrival of his wife at the police station about four hours after his arrest and incarceration. Aside from the testimony of Knoff, a state witness, that he requested counsel before the arrival of Mrs. Taylor, a point on which Knoff also testified to the contrary (R. 74-75), there was introduced at the preliminary investigation to determine the admissibility of petitioner's

confession affirmative uncontradicted testimony that prior to making any statement he repeatedly requested the right to communicate with his attorney (R. 82, 90, 91, 92, 95, 99, 105). Like evidence was given at the trial (R. 166, 177, 178, 195, 202).

Police Commissioner Boyle did not testify during the preliminary investigation but did testify at the trial and we quote from his testimony, as follows:

> "* * * Mr. Taylor said he wanted to talk to his wife before he made a statement or signed one. * * * He turned around and said he wanted to see his wife. He turned around and said, 'Can I see my wife and can I see an attorney too.' "
>
> (R. 166)

Petitioner, after his arrest, requested the privilege of communicating with his wife over the telephone but did not want her and their child brought to the police station, so stating to the police officers (R. 178-179). However, she was brought there under instructions of Inspector Hinds, who stated that this seemed to be the only way to get Taylor to make a statement or confession (R. 179).

Error in the Admission of Evidence

As conceived by petitioner, there was a violation of a rule of evidence that is elementary and fundamental, to-wit:

Mrs. York was asked if she did not make this statement to Lt. Huddleston: "That if her husband was involved in a fake holdup payroll robbery it was because of Carlos Taylor". Counsel for petitioner objected to the question but the objection was overruled. Mrs. York answered in the negative.

Lt. Huddleston testified in rebuttal. Over the objection of petitioner that the statement related to a collateral

matter, was hearsay and highly prejudicial, Huddleston was allowed to testify that Mrs. York made the statement to him (R. 205-206).

We have referred to the matter at this point in order that it may be more fully presented to the Court if the Petition for Certiorari is granted.

No Dispute as to Material Facts

As construed by petitioner, the evidence heard by the Court in the absence of the jury to determine the admissibility of the confessions did not involve any dispute as to the material facts.

Positive testimony that York was threatened with prosecution for forgery if he did not confess to the charge involved herein, that petitioner's request for counsel was refused, the police officials stating that an attorney would not do him any good, and that it would be better for him to make a statement, was met by general statements that no threats or promises were made and the assertions of a conclusion by two state witnesses that the confessions were freely and voluntarily made. As will be shown in the accompanying brief, such testimony did not present a substantial conflict with the positive, specific testimony of petitioner and his witnesses on the points stated.

Reasons Why the Writ Should Be Granted

I

Affirmative uncontradicted evidence at the preliminary investigation to determine the admissibility of petitioner's confession establishes that it was coerced and not voluntary. Petitioner, as shown in the Summary Statement, was advised directly by the police officers, and indirectly through statements made to his wife, that he would get off easier if he confessed than otherwise and such an

inducement renders a statement involuntary (*Boyd* v. *State,* 21 Tenn. 39; *Ann* v. *State,* 31 Tenn. 58; *Cross* v. *State,* 142 Tenn. 510, 221 S. W. 489).

Moreover, the wives of both petitioner and his co-defendant York were brought to the police station under circumstances that constituted the request of the officers that they come to the station a command they feared to disobey. Both of them were brought there, and particularly the wife of petitioner, for the purpose of unfairly influencing them to make a confession and, having brought her there for that purpose, the State cannot be heard to say that it was not accomplished (*Little* v. *United States,* 8th Cir., 93 F. 2d 401, 407; *Coulson* v. *United States,* 10 Cir., 51 F. 2d 178).

Bringing the wife of petitioner and their small child to the police station to observe his predicament and to hear his examination by police officers was calculated to upset and unnerve any man of normal sensibilities and thereby impair his freedom of will. It had that effect upon petitioner (R. 92, 165, 189).

Using Mrs. York as "bait" to entrap petitioner under the circumstances stated was a shocking disregard of fundamental decencies and bringing petitioner's wife and child to the police station to exert pressure on him to make a confession was the very refinement of cruelty. A confession obtained as the result of such coercion or applied "*psychology*" violated the due process clause of the Fourteenth Amendment (*Malinski* v. *New York,* 324 U. S. 401, 89 L. Ed. 1029).

II

Petitioner and his co-defendant York were arrested and detained in the police station for the purpose of wringing confessions from them. York was held in custody twenty-four hours before he made his first statement or confession,

which was not introduced in evidence; his second confession, the one introduced in evidence, was made about four or five hours later.

Petitioner was detained about four or five hours before he made a statement. Neither was taken before a committing magistrate until 2:30 p. m. July 20, 1949, this being approximately two days after the arrest of York and one day after petitioner's arrest.

York was arrested "for investigation" on a forgery charge and apparently on suspicion alone. York's involuntary confession, implicating petitioner, was the only justification or claimed justification for petitioner's arrest and it was not sufficient for such action.

Under the Tennessee rule, the testimony of an accomplice must be corroborated.[2] Consequently, a confession from petitioner would have been necessary to his conviction, and he was arrested and detained for the purpose of obtaining such a confession.

The use by the police of the custody of an accused to force him to make a confession constitutes a denial of due process of law and regardless of whether physical force or moral coercion is applied to obtain the confession. *Malinski* v. *People of State of New York, supra; Haley* v. *State of Ohio,* 332 U. S. 596; *Watts* v. *State of Indiana,* 338 U. S. 49; *Harris* v. *State of South Carolina,* 338 U. S. 68; *Upshaw* v. *United States,* 335 U. S. 410.

Here, however, we do not have detention alone for the purpose stated but detention combined with other coercive circumstances sufficient to impair the freedom of will of the accused.

III

The refusal of petitioner's request to be allowed to communicate with his counsel, made prior to his confession,

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[2] *Ripley* v. *State,* 189 Tenn. 681, 689, 227 S. W. 2d 26.

violated rights guaranteed by the due process clause of the Fourteenth Amendment. *Powell* v. *State of Alabama,* 287 U. S. 45; *Malinski* v. *New York,* 324 U. S. 401, 89 L. Ed. 1029; *Haley* v. *Ohio,* 332 U. S. 596.

Affirmative uncontradicted evidence, introduced at the preliminary hearing to determine the admissibility of the confessions, established that petitioner requested and was refused counsel before any statement was made.

The testimony of Lewis and Knoff, the two witnesses who testified at this hearing, did not contradict the evidence in behalf of petitioner on this point but the evidence of these witnesses, neither of whom was present throughout the questioning of petitioner, was entirely negative and established nothing more than the fact that these witnesses did not hear such a statement (R. 59, 74, 75, 76, 77).

Moreover, Police Commissioner Boyle, testifying at the trial but not at the preliminary investigation aforesaid, positively testified that petitioner, before any statement was made, asked to see his wife and also if he could "see an attorney" (R. 166).

IV

Evidence that is undisputed or not fairly disputable in the record shows that petitioner was the victim of a calculated endeavor on the part of police officials, through detention and mental ordeal, to pressure him into making a confession that was indispensable to the conviction of petitioner for the crime of which he was suspected. The steps in that planned invasion of his constitutional rights include:

(a) York's arrest "for investigation" on a forgery charge, which apparently was made for no other purpose except to coerce him into making a statement incriminating Taylor in the crime involved in this proceeding.

(b) The three hour visit of police Lt. Huddleston to Mrs. York, after her husband's arrest, for the purpose of so alarming her that she would allow herself to be used as "bait" in the police trap set for petitioner the next day.

(c) Arranging for Mrs. York to meet petitioner at a Memphis cafe, arresting petitioner there and taking him and Mrs. York together to the police station.

(d) Putting petitioner through the inquisition involved in requiring him to listen to the confession of York, made in the presence of petitioner's wife and Mrs. York, whose mental anguish was calculated to and did exercise a material influence in forcing petitioner to make a statement against his will.

(e) The stage setting when the confessions were signed, including the bringing of private citizens to witness the signatures and having petitioner and York stripped of all clothing and examined by physicians.

Taken together and viewed against a background of the threat two weeks before York's arrest "to put him on the rack" to make him talk (R. 84), and the implied threat by officers at the police station that if petitioner refused to make a statement they would get it the "hard way", the foregoing matters clearly show a situation where the accused would think it better to make confessions than to stand upon their constitutional rights and refuse to make any statement at all. This was such an abuse of official power as to "offend the procedural standards of due process" (*Watts* v. *State of Indiana*, 338 U. S. 49).

In considering the calculated endeavor and the means used to force confessions from the accused, it is not necessary to determine whether detention alone for the periods shown

would constitute a denial of due process,[3] nor to determine whether the coercion of York, nothing else appearing, could be complained of by petitioner, although York's confession was the sole basis for the arrest of petitioner. Under the circumstances disclosed by the record, the steps taken to obtain confessions from York and petitioner may not be separated.

However, if petitioner's confession was involuntary he would be entitled to a reversal regardless of the fact that evidence apart from the confession might be sufficient to sustain a verdict. *Malinski* v. *People of New York,* 324 U. S. 401; *Haley* v. *Ohio,* 332 U. S. 596, 599.

V

The statutes of the State of Tennessee (1932 Tennessee Code, Sections 11515, 11547-11557, printed in the addenda) provide adequate safeguards, including provision for obtaining counsel, to protect the rights of the accused in a preliminary hearing before a committing magistrate but, as construed by the Supreme Court of that State, make no provision to prevent his arrest with or without warrant and detention for purpose of "investigation". On this point, we quote from the opinion of the Tennessee Supreme Court in *Wynn* v. *State,* 181 Tenn. 325, 181 S. W. 2d 332, 334, as follows:

> "Section 11544 of the Code provides that: 'A private person who has arrested another for a public offense, shall, without unnecessary delay, take him before a magistrate or deliver him to an officer.' There is no such provision with respect to the duty of an officer making an arrest. True Section 11515 of the Code provides: 'No person can be committed to prison for any

[3] It would be if the case involved federal procedure. *Upshaw* v. *United States,* 335 U. S. 410.

criminal matter, until examination thereof be first had before some magistrate.'[4]

In Ashcraft v. State, supra, however, this Court, with respect to the detention of the defendants for 36 hours prior to the time they were taken before a magistrate, said that 'there was a temporary holding or arrest for examination purposes, and this is not a commital to prison within the spirit of our statute. Such an examination precedes a committal and an accused may be released before a warrant is issued.'

We do not understand that the Supreme Court reversed the Ashcraft case because of his detention but owing to the treatment he received during his detention * * *'' (181 S. W. 2d 334).

This construction of Section 11515, however strained, by the Supreme Court of Tennessee, is binding on this Court but, so far as we have been able to discover, there has been no adjudication on the point of whether the State should make reasonable provisions to protect a person accused of crime against unlawful detention for the purpose of obtaining a confession of crime, and this presents a question of substance that has not, but apparently should be, determined by this Court.

Holding a person in custody for several hours or days might not alone invalidate a confession but, where the period of detention is left to the discretion of arresting officers, this appears to be such a violation of due process requirements as to call for the application of corrective processes by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Ten-

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[4] A different construction was given Section 11515 in *Anderson* v. *United States*, 318 U. S. 350, 355, this Court construing that statute to mean what it says.

nessee, commanding that court to certify and send to this Court for its review and determination on a date certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket *Carlos Eugene Taylor* v. *State of Tennessee*, Shelby Criminal No. —, and that the judgment of said Supreme Court of Tennessee may be reviewed and reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 405

CARLOS EUGENE TAYLOR,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

I

The Controlling Dates

The final judgment of the Supreme Court of Tennessee herein was rendered July 15, 1950. The statutory period in which to apply for certiorari was extended to and including November 10, 1950, in an order issued by Mr. Justice Reed of this Court on September 29, 1950.

Jurisdiction

This Court has jurisdiction upon the petition here filed to require by certiorari that this cause be certified to the Supreme Court for determination by it and with like effect as if the same had been brought to the Supreme Court by unrestricted writ of error or appeal. Judicial Code, Sec-

tions 237(b) and 240(a), as amended by Act of February 13, 1925 (United States Code, Title 28, Sections 1257, 2101, 2103 and 2106), Supreme Court Rule 38.

II

Statement of the Case

The petitioner, a citizen and resident of Tennessee, seeks review of the judgment of the Supreme Court of Tennessee, affirming his conviction of larceny and receiving stolen property.

There was no material incriminating evidence against petitioner except in confessions made by petitioner and by his co-defendant, William Louis York, Jr., jointly indicted, tried and convicted with petitioner on the same charges.

Petitioner and York were convicted on two counts of an indictment and given a sentence of three years on each count, the sentences to run concurrently.

Count III charged Taylor and York with larceny, the charge being thus stated:

> "* * * did unlawfully and feloniously steal, take and carry away THE SUM OF FOUR THOUSAND FOUR HUNDRED NINETY SEVEN & 43/100 ($4,497.43) DOLLARS, good and lawful money of the United States, a more particular description of which is to the Grand Jurors aforesaid unknown * * *."

Count IV charged that Taylor "did unlawfully, feloniously and fraudulently receive, buy and conceal and aid in concealing" the sum of money described in Count III.

Motion for a new trial was duly made. One of the grounds thereof alleged that the admission of the confessions herein violated the rights of the accused as guaranteed by the Fourteenth Amendment to the Federal Constitution (R.

208). The motion for a new trial was overruled and the Supreme Court, on appeal, held that there was no error in admitting the confessions in evidence (R. 209, et seq.).

The Federal question is whether or not the confessions of petitioner and his co-defendant York were received in evidence in violation of due process requirements of the Fourteenth Amendment to the Federal Constitution.

III

The Facts

The facts have been recounted and in sufficient detail in the petition.

IV

Specifications of Error

1. The Supreme Court of Tennessee erred in failing and refusing to hold that the confession of York, implicating petitioner, was admitted in evidence in violation of petitioner's right under the due process clause of the Fourteenth Amendment to the Federal Constitution.

2. The Supreme Court of Tennessee erred in failing and refusing to hold that the admission in evidence of petitioner's confession violated the due process requirements of the Fourteenth Amendment.

3. Petitioner was denied the benefit of established rules of evidence which exclude prejudicial hearsay evidence and prevent the impeachment of a witness on a collateral matter in that the Supreme Court of Tennessee refused to apply corrective processes to the error of the trial court in permitting, over the objection of petitioner, the state to prove on rebuttal that Mrs. York told Police Lieutenant Huddleston that if her husband was involved in a fake payroll robbery petitioner was responsible therefor, a statement denied

by Mrs. York and not claimed to have been made in the presence of petitioner.[5]

V

The Opinion of the Supreme Court of Tennessee

Findings of fact by the Supreme Court of Tennessee, if supported by substantial evidence, will not be disregarded on review by this court.

However, as stated in the first paragraph of the syllabus in *Ashcraft* v. *Tennessee*, 322 U. S. 143, 88 L. Ed. 1192:

> "Where the claim is made of denial of due process in a state court by obtaining a conviction through use of a confession procured by coercion, the Supreme Court of the United States is bound to make an independent examination of the record to determine the validity of the claim, and the performance of this duty cannot be foreclosed by the findings of a court or the verdict of a jury, or both."

In making an independent investigation of the record to determine whether there has been a denial of due process, this court will find that the Supreme Court of Tennessee not only reached certain conclusions that are destitute of factual basis but also made findings of fact that are in direct conflict with undisputed testimony.

(1) With respect to the arrest of York and petitioner, the Tennessee Supreme Court said:

> "Responding now to the contention of counsel that 'arrests for investigation are not countenanced by the constitution and statutes of this State' it should be stated that the defendants were not arrested 'for investigation' but were taken into custody because a felony had been committed, admittedly so, and the

[5] This error is here specified to permit its consideration if the petition for certiorari is granted, and it will not be further discussed in this brief.

officers had reasonable grounds for believing that York and Taylor had committed it."

This finding was made in the face of positive uncontradicted testimony of the arresting officer that he arrested York "*for investigation*" (R. 10, 12, 16, 17, 18, 19, 144, 145), and as pointed out in the petition this investigation had no relation to the alleged crime involved in this proceeding.

(2) Dealing with the circumstances under which the confessions were made, the court said:

> "Several officers, including Inspector Hinds, and a business man who was present, testified that they made no promises to either defendant to obtain the confessions and no pressure was brought to bear upon them to induce a statement. On the contrary York insisted that the Inspector, or other officers, promised to make it light on him if he would implicate Taylor, and he was worried because of his wife's presence at the jail, etc. Another reason was he feared the officers might tell his wife about some alleged sex perversions which had been made against him.
>
> The defendant Taylor contended that he was not guilty and that he was 'upset' because of his wife and child being kept at the jail until a late hour, and he confessed so that they might be allowed to go home (it was then after 12 o'clock at night).
>
> Contention is further made that Taylor was under duress because he was not allowed to call his lawyer; that he was told 'he didn't need a lawyer' and that 'a lawyer would not do him any good' etc. This however was expressly denied by those present and presented an issue of fact for the court in deciding the admissibility of the confession, and also the weight to be given the confession by the jury as to its truth or falsity." (R. 213)

Inspector Hinds did not testify at all, and none of the officers who did testify, nor the business man referred to,

was present through all stages of the inquisition of York and petitioner. Moreover, the record will be searched in vain for a denial of the specific testimony of petitioner and other witnesses that he was told by Commissioner Boyle, Police Chief Armour and Inspector Hinds that "he didn't need a lawyer" and that a "lawyer would not do him any good."

Chief Armour and Inspector Hinds, two of the three officials shown by positive testimony to have told petitioner that he did not need a lawyer and that a lawyer would not do him any good, did not testify at all.

Commissioner Boyle, the third of these witnesses, did not testify at the preliminary hearing but testified at the trial. In his testimony he did not deny the statement attributed to him by petitioner but did say that petitioner, before making any statement, asked if he could see his wife and *see his lawyer.*

It was stipulated in the record that the testimony of Armour and Hinds, if they testified, would be "cumulative". "Cumulative" of what? Of Boyle's testimony that petitioner requested counsel before making any statement? Or the negative testimony of some of the state witnesses that they did not hear such a request, if made? The record does not suggest an answer to these questions but simply discloses a situation where testimony that officials made certain statements is met only by the silence of these officials.

Argument

We state and propose to argue these propositions:

(1) York was arrested "for investigation" on a forgery charge not connected with the offense involved herein. Whether there was probable cause to believe him guilty of forgery or whether he was merely suspected of that crime is

not disclosed by the record. He was not formally charged with nor prosecuted for the commission of that offense and it is clear of doubt that the purpose of his arrest and threatened prosecution for forgery was to extort a confession of the payroll larceny that would implicate petitioner.

(2) The coerced confession of York, this being his first confession and made prior to the arrest of petitioner, was the only justification or claimed justification for the arrest of petitioner without a warrant for participation in the payroll larceny.

York's first confession, not introduced in evidence, led to his second confession, made after petitioner was taken into custody and in his involuntary presence. Petitioner had to listen to it, and under circumstances that made a denial impractical and ineffective. If an accused ever needed an attorney to advise him, and regardless of his guilt or innocence, in so distressing and perilous a situation, petitioner was in such need.

York's confession was admitted in evidence over his objection, and also over the objection of petitioner. Petitioner was jointly tried with York over his objection.

Ordinarily, the violation of the constitutional rights of York would only affect him personally, and he alone could claim the protection afforded him by the Fourteenth Amendment, but here petitioner was the real and intended victim of the coercion of both York and himself. Under such circumstances coercion of York was a prejudicial invasion of petitioner's constitutional rights. If A commits a battery on B, the latter alone may obtain redress for his injuries. But if A strikes B for the purpose of flinging him against C with such violence as to knock the latter down, then C would have a right of action against A. This situation is analogous to the duress of York in order to make effective the coercion of petitioner.

Due process is not a technical concept, and should not be determined on the basis of procedural niceties. York was coerced and his coercion was one of the means through which an involuntary confession was obtained from petitioner.

(3) The use of Mrs. York, under the circumstances disclosed by the record, as *"bait"* in the police trap set for petitioner was *"exceedingly indecent and beneath the dignity"* of the State of Tennessee.[6] Such conduct may also be aptly described in the language used by this Court in *Sorrells* v. *United States,* 287 U. S. 435, 444, in which it refers to entrapment as *"unconscionable, contrary to public policy, and to the established law of the land".*

There is nothing in the record remotely reflecting on the moral character of either petitioner or Mrs. York. Petitioner knew her husband but he and Mrs. York had never had any meeting before the date of his arrest and he met her, at her request, after being informed that her husband was in jail (R. 171, 174). Responding to her appeal for funds to pay rent and provide for her baby, he went to the Hitching Post to keep an appointment which she had arranged as directed by the police and while there both of them were taken into custody and carried to the police station (R. 174). Mrs. York was required to go to the police station at the time of petitioner's arrest (R. 201). Being thus taken into custody and to the police station in company with Mrs. York was calculated to, and doubtless intended to humiliate and upset petitioner. York had made a confession implicating petitioner before the prearranged arrest of the latter when he met Mrs. York at the Hitching Post and it was, therefore, not necessary to plan for Mrs. York to meet Taylor at the Hitching Post and to take them into

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[6] The language quoted is from *Wall* v. *United States,* 65 F. 2d 993, 994.

custody and to the police station together. Petitioner owned and operated a restaurant in Memphis and the police did not need the assistance of Mrs. York in locating petitioner.

(4) Testimony establishing inducement and coercion to obtain confessions is not contradicted in the record. Included in this testimony is the statement to York that if he did not confess to the payroll robbery he would be prosecuted for forgery, that certain moral indiscretions on his part would be brought to the attention of Mrs. York, the assurance of police officials to her that her husband would get off easier if she cooperated with the police in getting something on petitioner, telling Mrs. Taylor that petitioner would get off lighter if he made a confession, the suggestion by Inspector Hinds that if he did not confess the police would get information in the "hard way", the declarations in petitioner's presence that he did not need a lawyer and that a "lawyer would not do him any good", and testimony that Mrs. York, when brought to the police station and taken into the presence of her husband "was crying", that Mrs. Taylor, while at the police station, was on "pins and needles" (R. 197)—all of these matters, as heretofore stated, were established by undisputed testimony.

(5) The overwhelming weight of the evidence, and in some particulars the undisputed evidence, establishes that both petitioner and his wife, in his presence, were told by police officers that it would be easier on petitioner if he confessed, that a lawyer would not do him any good and that his request to see a lawyer, made prior to his making any statement, was refused (R. 82, 83, 90, 91, 92, 93, 95, 99, 105, 166, 177, 178, 179, 180, 202). The evidence offered by the state at the preliminary hearing to determine the admissibility of the confessions was restricted to the testimony of police Lt. Lewis and the witness Knoff. Lewis stated positively that while he did not hear petitioner's

request for a lawyer, he "wouldn't say he (petitioner) didn't make that request" (R. 59). It appears without question that petitioner made no statement prior to the arrival of his wife. Knoff testified that petitioner did ask for a lawyer but his testimony as to when that request was made is so inconsistent and selfcontradictory as to be without probative value on that point. He stated that petitioner asked for a lawyer but as to the time when petitioner requested an attorney, this witness gave three different versions, to-wit: (a) that he did not know whether the request was before petitioner signed a confession; (b) that it *was made before* Mrs. Taylor arrived; and (c) that it *was not made* until after her arrival (R. 74, 75). If Knoff's testimony alone should be considered, it establishes that Taylor did request a lawyer but leaves it in doubt as to when that request was made. So we conclude that the evidence that Taylor did request counsel before making any statement is so overwhelming as to leave no room to doubt what the fact is and, in that situation, such request must be considered as an established fact.[7]

(6) The question of whether a statement is voluntary or involuntary must be determined by the Court preliminary to its admission in evidence. In its opinion in the instant case the Supreme Court of Tennessee so holds. It also holds that its weight is a question for the jury. As heretofore stated, Lt. Huddleston did not testify during the inquiry made to determine the admissibility of the confessions but did testify at the trial. Lewis and Knoff testified on the inquiry and also at the trial. The testimony of both Lewis and Knoff at the trial is directly contradictory to the testimony given on the preliminary inquiry with respect to petitioner's request to see an attorney. (As to Lewis—R. 59, 125; as to Knoff—R. 75, 159, 160). Lewis testified

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[7] *Gunning* v. *Cooley*, 281 U. S. 90.

that when Petitioner was taken from his cell to the office of Inspector Hinds he denied any knowledge or participation in the alleged crime, that the Inspector thereupon directed that petitioner be taken back and locked up and that Lt. Huddleston was with him when this occurred (R. 135). Lt. Huddleston, testifying at the trial, stated that this did not occur (R. 147, 148).

In view of the inconsistency and contradictions in the testimony of the state witnesses, the record seems to present a clear case for the recognition and application of the principle thus stated by the Supreme Court of Tennessee in *Churn* v. *State,* 184 Tenn. 646, 202 S. W. 2d 345, 347:

> "This Court has repeatedly denounced the mistreatment by officers of a prisoner for the purpose of forcing a confession, or for any other reasons. * * *
>
> Quite uniformly the charge that such treatment has been administered has been denied by the officers accused and the Court has been forced to look to other evidential sources to ascertain the facts. * * *"

The Applicable Law

(1) The fact that no threats or promises were made or inducements offered either petitioner or York while Knoff and other outside witnesses were present to witness the signing of the confessions is not a material consideration in determining their admissibility. They were in custody and any prior improper influence exerted upon them will be presumed to have continued until the confession was obtained unless the state shows that such influence had been removed. *Williams* v. *State,* 186 Tenn. 568, 212 S. W. 2d 383, 385 and authorities therein cited.

(2) York's confession, if made in the presence of the police officials upon inducements offered him by his wife, would be involuntary and inadmissible in evidence. *Hanus* v. *State,* 104 Tex. Cr. 543, 286 S. W. 218, 219-221.

(3) Statements made by different police officers to both York and petitioner that it would be easier on them if they confessed, the assurance given York that he would escape prosecution for forgery if he made a statement incriminating petitioner, and a statement to the latter that a lawyer would not do him any good and that it would be better for him to confess, constituted such inducement as to render the statements of both York and petitioner inadmissible in evidence. *Boyd* v. *State*, 21 Tenn. 39; *Ann* v. *State*, 30 Tenn. 58; *State* v. *Williamson*, 339 Mo. 1038, 99 S. W. 2d 76, 79.

(4) The refusal of petitioner's request for counsel, made while he was in custody and prior to his making any statement, violated the due process clause of the 14th Amendment. *Powell* v. *State of Alabama*, 287 U. S. 45; *Malinski* v. *People of New York*, 324 U. S. 401; *Haley* v. *State of Ohio*, 332 U. S. 596; *Harris* v. *State of S. Carolina*, 338 U. S. 68.

(5) The use by the police of the custody of an accused to wring a confession from him constitutes a denial of due process of law. *Watts* v. *State of Indiana*, 338 U. S. 49; *Harris* v. *State of S. Carolina*, 338 U. S. 68; *Haley* v. *State of Ohio*, 332 U. S. 596; *Malinski* v. *People of State of New York*, 324 U. S. 401; *Ashcraft* v. *State of Tennessee*, 322 U. S. 143; *Ward* v. *State of Texas*, 316 U. S. 547; *Lomax* v. *State of Texas*, 313 U. S. 544; *Vernon* v. *State of Alabama*, 313 U. S. 547; *White* v. *State of Texas*, 310 U. S. 530; *Canty* v. *State of Alabama*, 309 U. S. 629; *White* v. *State of Texas*, 309 U. S. 631; *Chambers* v. *State of Florida*, 309 U. S. 227.

In *Upshaw* v. *United States*, 335 U. S. 410, the majority opinion, by reason of Rule 5(a) of the Federal Rules of Criminal Procedure, extended the rule in the *McNab* case (318 U. S. 332) to exclude *a confession obtained from detention alone.*

It is not contended here that the mere fact that a confession was obtained while the accused was in custody would require its exclusion under the due process clause of the 14th Amendment.

In view, however, of the development of the concept of due process as applied to confessions made under the circumstances set out in the several cases above cited where state decisions have been reversed because of the denial of due process in obtaining confessions, it seems clear of doubt that while detention alone may not invalidate a confession obtained by state law enforcement officials from an accused in custody, such detention may be considered in connection with other circumstances in determining whether the confession in a particular case was coerced or voluntary. In the instant case the obvious purpose of the arrest of petitioner and his co-defendant York was to force them to make confessions and it is clear of doubt that they were justified in believing that the officials would go to whatever extremes of mental coercion, if not physical, that were necessary to obtain these confessions. In view of the statement of police officers, in the presence of York about two weeks before his confession was obtained, that he should be "put on the rack" and made to talk, was he not justified in his testimony that he knew what would happen to him if he refrained from making a statement? (R. 84) And in view of the question asked petitioner by Inspector Hinds when he told that official he had nothing to say, "Do you want us to get it the hard way?" (R. 89), was not petitioner justified in believing that it would be better for him to make a statement than to stand upon his constitutional rights and refuse to answer questions asked by the police officials?

The record in this case affords an example of the use of coercive psychology, more reprehensible than the use of

force, to obtain a confession from an accused in custody who was denied the right to consult counsel until the purpose of the officers had been accomplished.

Police pressure to obtain confessions was not restricted to petitioner and his co-defendant York, but was also applied to their wives and the use by the police of the custody of an accused to wring a confession from him through such an application of applied psychology should be condemned by the courts. *Harris* v. *State of South Carolina; Haley* v. *State of Ohio; Malinski* v. *People of New York, supra.*

In *Watts* v. *State of Indiana,* 338 U. S. 49, this Court said:

> "When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary. * * * To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court, with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.
>
> * * * * * * *
>
> In holding that the Due Process Clause bars police procedure which violates the basic notions of our accusatorial mode of prosecuting crime and vitiates a conviction based on the fruits of such procedure, we apply the Due Process Clause to its historic function of assuring appropriate procedure before liberty is curtailed or life is taken. * * *"

Conclusion

There are two additional points we wish to emphasize in conclusion:

(1) When Commissioner Boyle, who did not testify during the preliminary investigation of the circumstances under which petitioner's confession was obtained, testified at the trial as follows:

> "* * * Mr. Taylor said he wanted to talk to his wife before he made a statement or signed one. * * * He turned around and said he wanted to see his wife. He turned around and said, 'Can I see my wife and can I see an attorney too?' "

the trial court, on its own motion, should have excluded the confession from the consideration of the jury. It was immaterial that this testimony was introduced after the court had ruled on the preliminary inquiry that petitioner's confession was admissible in evidence. The question involved was not a mere matter of state procedure but the federal constitutional rights of the accused, which the court was obligated to protect at every stage of the proceedings. *Brown* v. *State of Mississippi*, 297 U. S. 278. If theretofore any doubt existed as to petitioner's request for counsel, that doubt was removed by the testimony of Commissioner Boyle.

(2) There seems to be an anomalous situation created by the Tennessee statutes relating to arrest and procedure following arrest.

If the accused in the instant case, after their arrest, had been taken before a magistrate for examination, it would have been the duty of that official, under the provisions of Sections 11547, 11549, 11555, 11557 and 11733 of the Code of Tennessee (1932), to have advised them of their right

to make or to waive the making of a statement and to the aid of counsel and to have allowed them a reasonable time to obtain the aid of counsel. In cases of failure to give such advice and afford such opportunity, no statement made by the accused before the magistrate would have been admissible in evidence at the trial. *Giles* v. *State,* 185 Tenn. 429, 206 S. W. 2d 412, 414; *Polk* v. *State,* 170 Tenn. 270, 94 S. W. 2d 394.

Apparently, the Tennessee statutes (set out in the Addenda), as construed by its Supreme Court, vest in the arresting officer the discretion as to how long the accused may be held in custody for investigation and apply to such detention none of the safeguards that are thrown around him after he is brought before a committing magistrate.

Whatever may be the effect of this omission upon state procedure, it should not be applied to sanction the "use by the police of the custody of an accused to wring a confession from him." On the contrary, the failure of the State to provide safeguards against unreasonable detention of the accused by arresting officers affords an additional reason why this Court should enforce procedural standards of due process. It did this in the *Ashcraft* case and the sound precedent therein established should be followed in the instant case.

Respectfully submitted,

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ADDENDA

Sections 11515, 11547, 11548, 11549, 11555, 11556, 11557 and 11573 of the Code of Tennessee (1932), referred to in the petition and brief, are here set out in full:

11515. *No commitment until examination.*—No person can be committed to prison for any criminal matter, until examination thereof be first had before some magistrate.

11547. *Notice of charge, and of right to counsel.*—When the defendant is brought before a magistrate upon arrest, either with or without warrant, on a charge of having committed a public offense, the magistrate shall immediately inform him of the offense with which he is charged, and of his right to aid of counsel in every stage of the proceedings.

11548. *Time to send for counsel.*—The magistrate shall allow the defendant a reasonable time to send for counsel, and, if necessary, shall adjourn the examination for that purpose.

11549. *Examination as soon as may be; counsel.*—The magistrate shall, as soon as may be after the defendant appears, or, if the defendant require the aid of counsel, after waiting a reasonable time therefor, proceed to examine the case.

11555. *Right of defendant to make a statement.*—When the examination of the witnesses on the part of the state is closed, the magistrate shall inform the defendant that it is his right to make a statement in reference to the charge made against him, or that he may waive the same; and such waiver cannot be used against him on the examination before the magistrate, or on the trial.

11556. *To be taken down in writing.* If the defendant choose to make a statement, the magistrate shall proceed to take the same in writing, without oath, and the statement, when written, shall be read over to him

and signed by him; or, if he refuses to sign after it is written, his reasons for such refusal shall be stated by the magistrate.

11557. *Questions which may be put to him.* The magistrate may, with the defendant's consent, put to him the following interrogatories only: (1) What is your name and age? (2) Where were you born? (3) Where do you reside, and how long have you resided there? (4) Give any explanation you think proper of the circumstances appearing in the testimony against you, and state any facts which you think material to your defense.

11573. *Penalty for neglect.* Any magistrate or other officer failing to make return to court, as herein required, of any papers whatsoever, is guilty of a misdemeanor in office, and may also be compelled by a rule of the court, or, in case of disobedience, by attachment for contempt, to return the same; and he is also liable to a penalty of twenty-five dollars, one-half to the informer and the other to the county.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 405

CARLOS EUGENE TAYLOR,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF IN OPPOSITION

W. F. BARRY, JR.,
Solicitor General of Tennessee;
ROY H. BEELER,
Attorney General of Tennessee;
J. MALCOLM SCHULL,
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York and the petitioner made their confessions freely and voluntarily, with the result that the admission of the confessions in evidence was not in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States 7

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BRIEF IN OPPOSITION

Opinion Below

The opinion of the Supreme Court of Tennessee (R. 302-318) is not reported.

Jurisdiction

The Supreme Court of Tennessee affirmed the judgment of the Trial Court July 15, 1950. (R. 302). The time for filing the petition herein was extended to November 10, 1950 by Order entered September 29, 1950. (R. 327). Jurisdiction rests on Title 28 U. S. C. 1257 (3).

Question Presented

The petitioner presents only the question whether his conviction in the Courts of Tennessee rests upon confessions which were coerced in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Constitutional Provision Involved

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or property, without due process of law; . . ."

Statement

William Louis York, Jr., a veteran, was employed by the Perkins Oil Company of Memphis, as a training Office Manager under the G. I. Bill. One of his duties was to obtain the weekly payroll from the bank. On May 27, 1949 he received, among other papers destined for the bank, a check drawn by the Vice President of the Company on its account at the Union Planters National Bank and Trust Company, payable to the order of W. L. York, Jr., Agent, in the sum of $4497.43. (R. 9-10). Prior to his departure, the bank had been notified the amount of the payroll which had been made up in the appropriate denominations and placed in a sealed container. Upon arrival at the bank York endorsed the check in question and received the payroll. (R. 10). About 3:00 o'clock on the same afternoon he called the Vice President of the Company, who had signed the check and informed him that he had been held up and was calling from a grocery store in south Memphis. (R. 9). Upon instructions, he there awaited the arrival of officers, to whom he reported that he had been held up by two unidentified white men. (R. 10).

While being detained over night York was interviewed by police officers. He was interrogated thereafter from time to time until the 18th day of July, 1949. (R. 11). On the afternoon of that day detectives asked him, in the presence of one of his superiors, where he had obtained the funds with which to buy certain furniture. He advised that he had borrowed this money from a friend, whose name he would not disclose without consent of the friend. The amount of the loan was fixed at $500.00. Later they contacted the petitioner at his restaurant and he advised the officers that he had loaned York $100.00. (R. 204). He later stated that he had loaned him $500.00, but had said originally that he had loaned him $100.00, because he did not want anyone, particularly his wife, to know he was loaning money. He had taken no note or other evidence of the indebtness until after both had been arrested. (R. 204, 254, 266). Petitioner testified that he knew York only casually as a customer. (R. 265).

York was detained over night. During the evening one of the detectives interviewed his wife at their home for about three hours. The next morning a detective called Mrs. York at her home, picked her up in a patrol car, and took her to the place of detention to see her husband. York testifies that his wife was brought there contrary to their desires but she admits that she came voluntarily because of her desire to help her husband. (R. 52). At the suggestion of a detective, Mrs. York telephoned Taylor at his place of business and arranged to meet him that afternoon at Thompson's restaurant. (R. 208-210). When she met him she told him that her husband was being detained and that she was in need of money to buy food for their child and to pay rent. They agree that he told her that he had $7.00 or $8.00, which she declined to take. He promised her that he would endeavor to obtain some money

for her. (R. 57-58, 249). She reported back to the police station and called the petitioner again, arranging to meet him at another restaurant. When she met him the second time he brought $50.00 from the cash register in his place of business. (R. 144, 251). Petitioner had not known Mrs. York before that day but was going to lend her $50.00 to pay rent and buy groceries. (R. 267). The detectives first called the petitioner out of the restaurant and then called Mrs. York and took both of them to the police station. (R. 252). The police were not using Mrs. York as bait to catch petitioner. "We knew where we could pick up Mr. Taylor any time we wanted to pick him up." (R. 79). Taylor was arrested as result of information obtained from York. (R. 207). In the meantime, York had given a brief statement as to how the money disappeared and had stated that he would make a full statement in the presence of the petitioner. (R. 30-31, 80).

That evening when York and Taylor were brought together in the presence of several officers and four or five Memphis business men, (R. 66, 70, 72, 132, 167), York made a full confession after being advised of his constitutional rights including the right to Counsel (R. 19, 22, 66, 76, 96), in which he stated that he had become acquainted with Taylor by reason of taking lunch in the latter's restaurant. They had done some gambling in Taylor's home. (R. 203). His statement is to the effect that Taylor suggested that they fake a holdup. It was later agreed that on the next payday York would call Taylor and advise him when he would be at a certain point, and that he did so. He arrived at this point a little in advance of Taylor, who drove up shortly in a cream colored Mercury sedan. York got into the car and laid down on the floor board where he remained until Taylor slowed down, whereupon he got out of the car, leaving the payroll, and went to a store where he placed

the call which has been referred to. He says that he received from Taylor approximately $2000.00 which was picked up in $100.00 and $200.00 lots from day to day, but that Taylor still owed him approximately $230.00 out of his half of the payroll. He says that they concocted the story about the $500.00 loan to explain the source of the money he had expended for furniture. (R. 159-164, 169-180).

When this statement had been completed in Taylor's presence, (R. 67), he was asked if it were true. He stated, in effect, that York's statement was true, except that York, himself, originally suggested the scheme and that he did not owe York any further money. (R. 223, 235). He declined to answer a number of questions propounded to him by the officers. (R. 138, 184-185, 264, 270, 271, 275). He was advised of his constitutional rights before he made his statement, (R. 88-89, 100), including his right to Counsel. (R. 112).

Approximately one-half of this record is composed of proceedings in the absence of the jury to determine the admissibility of the confessions. (R. 11-164). The State's evidence is that both statements were made freely and voluntarily without any threats or promises of leniency and without coercion in any other form. (R. 11, 14, 19, 66, 69, 80, 97, 100, 101-182, 206-7, 233). The defense evidence is that York was coerced by reason of the officers having informed or threatened to inform his wife about some sexual perversions in which he had engaged; by reason of his wife's presence during the investigation and by a promise that if he would make a statement and implicate Taylor he would not be prosecuted on a separate charge of forgery, apparently arising out of another transaction. (R. 27, 29, 116, 122). He also testifies that about two weeks before his arrest an officer said to "Put him on the rack and he will talk." (R. 122).

On the preliminary question as to the admissibility of the confessions, the defense evidence on behalf of Taylor is that he requested permission to call his wife and ask her to close the restaurant since they were the only two who had keys and the help at the restaurant was inexperienced; (R. 130, 255) that the officers declined to call or permit him to call his attorney; (R. 119) that that evening they called and brought his wife and young daughter to the police station without his consent and contrary to his and her wishes; (R. 259) (this being denied by Mr. Knoff who testified that petitioner said he did not want to answer any questions until his wife got there (R. 107;)) that he was advised that it would be easier for him if he made a confession but that if he did not do so they would get the information the hard way. (R. 130, 133, 146). The child was well cared for in another office. (R. 237-8).

Only one of the Memphis business men present at the time the confessions were taken was called to testify. (R. 95-114). His testimony is that the confessions were given freely and voluntarily without coercion of any kind. (R. 96-7, 221, 226-7). Taylor was calm in making his confsesions. (R. 288). He and certain of the officers present testified that Taylor did make some suggestion about calling an attorney, but this was only after he had made his statement. (R. 91, 106, 107, 230-1). Commissioner Boyle, however, testified that before Taylor made his statement he asked if he would be permitted to talk with his wife and his attorney. (R. 240). Taylor says that he asked seven to ten times for permission to call a lawyer. Other defense evidence is that he made this request one or more times.

The day following the confessions both defendants were arraigned. (R. 189). Immediately following the con-

fessions they were examined by a physician who testified that they were calm and tranquil and showed no evidence of mistreatment. When asked by the doctor whether they had been mistreated they replied in the negative. (R. 244-6).

York did not testify in the presence of the jury. In his own defense Taylor testified that he knew nothing of the faked holdup and had no part in it. He says that his confession was false and that he signed it only because he was upset. (R. 261). While he says that he was threatened and advised that they would get the information the hard way, "the only hard way they gave me was bringing my wife and baby to that jail". (R. 274). When asked if anyone in the room made any threats against him or his wife or baby he replied, "Not that I know of". (R. 274-5).

The State's evidence is that Mrs. Taylor was brought to the police station at Taylor's request. (R. 224, 237). While she testified that she thought she had to go when the policemen came for her, she made no objection to going and went to have an opportunity to talk with her husband (R. 285) and nobody threatened or mistreated her. (R. 286). She had testified on the preliminary question that she had no objection to going and that she went because she wanted to see her husband. (R. 151).

Summary of Argument

York and the petitioner made their confessions freely and voluntarily, with result that the admission of the confessions in evidence was not in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Argument

It cannot be seriously questioned that a felony had been committed and that the officers had reasonable cause for

believing that York and Taylor committed it. This being true, they had authority to take them into custody without a warrant. 1932 Code of Tennessee, Sec. 11536; *Thompson* v. *State*, 185 Tenn. 73, 75.

Taylor knew for some weeks that he was under suspicion in connection with this holdup and had ample opportunities to consult an attorney as to his rights and as to what he should or should not do. In addition, his action in declining to answer many questions clearly shows that he knew his rights and that he was not intimidated.

It is asserted that the petitioner and York were coerced by reason of the presence of their wives at the police station. This situation is quite the reverse of that usually presented to the Courts for determination when it is asserted that prisoners are held incommunicado and in solitary confinement or surrounded only by officers of the law until they make a confession. It appears in this case that the officers did everything in their power to assure that there could be no basis for even a suspicion that these defendants were coerced into making confessions. While these men testify that they did not want their wives at the police station (R. 29, 259) and their wives testify that they came only because the officers asked them to do so, (R. 52, 150), the wives contradict themselves by stating very frankly that they came to the police station voluntarily to see and aid their husbands in every way possible. (R. 151, 285, 292). The one of the four Memphis business men who were present testified that the defendants were not abused in any way, that they were advised as to their constitutional rights and that their confessions were made freely and voluntarily. (R. 96-7, 221, 226-7). As has been noted, Taylor's confession, which is the one primarily under consideration here, furnishes very strong internal evidence that it was made freely and voluntarily, without coaching or suggestions. Taylor answered

such questions as he wanted to answer and declined to answer all others. (R. 138, 184-5, 264, 270-1, 274).

While Taylor and his wife testify that the officers stated that it would be easier for him if he made a confession and that they would get the information the hard way if he did not do so, (R. 130, 133, 146), there is no evidence that any leniency of any kind was promised to him in return for the making of a confession. In testifying before the jury he admits that no threats were made and that the only "hard way" was bringing his wife and baby to the police station. (R. 274-5).

Since Taylor acquiesced in York's confession and admitted it was true, except as to which of them suggested this faked holdup and a matter of accounting between them, (R. 223, 235), the State fails to see how he can complain of the admission of York's confession in evidence even if it had been obtained by coercion or promises of leniency. Even if York's confession had been inadmissible as to him the fact that Taylor admitted it was true, except as to immaterial details, when it was made and read in his presence made it admissible as evidence against him.

Sparf v. *United States,* 156 U. S. 51; 39 L. Ed. 343;
Camper v. *State,* 187 Tenn., 511, 513.

Although the foregoing will, the State respectfully insists, dispose of this assignment the State does not concede that York's confession was inadmissible as to him.

While York and his wife testify on the preliminary question that the officers indicated that York would not be prosecuted upon a separate forgery charge if he implicated Taylor, (R. 27, 29, 51), York testifies that he was questioned about the forgery matter about two weeks prior to the time he made his confession and that he does not remember being asked anything about it on July 18 or 19. (R. 43). After

cross-examination on this question he was asked and answered as follows:

> "Q. You were not asked about the forgery matter on July 18?
> A. No sir.
> Q. You were simply asked if you wanted to make a statement about this matter?
> A. Yes.
> Q. You made a statement after seeing your wife, you made the statement you have in your hand?
> A. After seeing her three or four times during the day and talked to by Lt. Lewis and Lt. Huddleston, I did make this statement." (R. 43-44.)

York seeks to imply that he was coerced to some extent into making a confession of this crime to keep the officers from telling his wife about certain sexual perversions which had come to the attention of the officers, (R. 45-6), but he testifies that on the night of the 18th, prior to his confession on the 19th, the detective conveyed to Mrs. York all of the information he had on this subject. (R. 30). The State's evidence is that no kind of promise was made to York. (R. 66).

A denial of due process, in criminal cases, is defined as the failure to observe that fundamental fairness essential to the concept of justice. *Lisenba* v. *California,* 314 U. S. 219, 86 L. Ed. 166.

Whether or not due process has been denied varies according to the attendant circumstances. *Betts* v. *Brady,* 316 U. S. 455, 86 L. Ed. 1595.

As to the introduction of confessions, the test of due process seems to be a free choice to admit, to deny, or to refuse to answer, on the part of one making such confession. *Ward* v. *Texas,* 316 U. S. 547, 86 L. Ed. 1663; *Lisenba* v. *California, supra.*

Though this court makes its own independent findings where there is an averment of lack of due process, deference will be paid to the findings of the Supreme Court upon disputed questions of fact, unless such findings be without substantial support in evidence. *Lisenba* v. *California, supra*; *Ward* v. *Texas, supra.*

The Fourteenth Amendment leaves the states free to adopt their own tests as to the admissibility of confessions, so long as due process is present. Ibid.

Due process is not denied by the failure to advise against self-incrimination nor as to the right of counsel. *Wilson* v. *United States,* 162 U. S. 613, 40 L. Ed. 1090; *Powers* v. *United States,* 223 U. S. 303, 56 L. Ed. 448.

The construction of state statutes by the court of last resort of such state is accepted by this court in dealing with constitutional questions. *Watson* v. *Buck,* 313 U. S. 387, 85 L. Ed. 1416; *Minnesota ex rel. Pearson* v. *Probate Ct.,* 309 U. S. 270, 84 L. Ed. 744; *Hartford Acci. & Indem. Co.* v. *N. O. Nelson Mfg. Co.,* 291 U. S. 352, 78 L. Ed. 840.

The rule in Tennessee is that the admissibility of confessions presents a mixed question of law and fact to be determined by the trial judge, to the exclusion of the jury, with his action subject to review at the hands of the Supreme Court. *Boyd* v. *State,* 21 Tenn. 39; *Self* v. *State,* 65 Tenn. 244; *Beggarly* v. *State,* 67 Tenn. 520; *Woodruff* v. *State,* 164 Tenn. 530; *Polk* v. *State,* 170 Tenn. 270; *Rounds* v. *State,* 171 Tenn. 511. This is recognized as the true rule. Wigmore, Evidence, 3d Ed., Sections 487, 861.

Neither the State of Tennessee nor its Supreme Court understands that the Supreme Court reversed the case of *Ashcraft* v. *Tennessee,* 322 U. S. 143, 88 L. Ed. 1192, because of his detention but because of the treatment he received during his detention. *Wynn* v. *State of Tennessee,* 181 Tenn. 325, 331. The case at bar is clearly distinguishable

from the *Ashcraft* case in which for 36 hours after his seizure, during which period he was held incommunicado, without sleep or rest, experienced investigators and highly trained lawyers questioned him without respite.

Other cases relied upon by petitioner are equally distinguishable. The rule announced by this court in *McNabb* v. *United States,* 318 U. S. 332, 87 L. Ed. 819, with reference to preliminary hearings is without application in the State of Tennessee because of the distinction between its statutes and the Federal statutes. *McGhee* v. *State of Tennessee,* 183 Tenn. 20, 26.

The conviction in the case of *Brown* v. *State of Mississippi,* 297 U. S. 278; 80 L. Ed. 682, was reversed because the confessions were obtained as a result of unmerciful abuse of the defendants.

The conviction in the case of *Chambers* v. *Florida,* 309 U. S. 227, 84 L. Ed. 716, was reversed because the confessions were obtained after the petitioners had been subjected to five days of interrogations culminating in an all-night examination, during all of which time the petitioners were denied the privilege of seeing or conferring with Counsel or a single friend or relative.

The conviction in *White* v. *Texas,* 309 U. S. 631, 84 L. Ed. 989, was reversed simply upon the authority of the *Chambers* case.

Upon a petition for a rehearing, the conviction in *White* v. *Texas,* 310 U. S. 530, 84 L. Ed. 1342, was reversed because the confession was obtained from an illiterate colored farm hand after he had been taken into the woods for six or seven days and beaten on successive nights by Texas Rangers.

The conviction in the case of *Canty* v. *Alabama,* 309 U. S. 629, 85 L. Ed. 988, was reversed without citation of facts or authority.

The conviction in the case of *Lomax* v. *Texas,* 313 U. S. 544, 85 L. Ed. 1511, and the conviction in *Vernon* v. *Ala-*

bama, 313 U. S. 547, 85 L. Ed. 1513, were reversed on the authority of the *White* and *Chambers* cases.

The conviction in the case of *Ward* v. *Texas,* 316 U. S. 547, 86 L. Ed. 1663, was reversed on the ground that "the effect of moving an ignorant negro boy by night and day to strange towns, telling him of threats of mob violence, and questioning him continuously, is evidenced from petitioner's statement to County Attorney Rolston that he would be glad to make any statement that Rolston desired."

The conviction in *Malinski* v. *N. Y.,* 324 U. S. 401, 89 L. Ed. 1029 was reversed, notwithstanding the holding that the question as to whether the second confession was coerced was properly submitted to the jury and notwithstanding the proper instructions by the trial Court to the jury that evidence as to the first confession was adduced only for the purpose of showing that the second confession was coerced and notwithstanding there was no evidence of long confinement or continuous grilling. In reading the majority opinion the conclusion is inescapable that the conviction was reversed because of the statements of the Prosecuting Attorney in his summation justifying the conduct of the officers as necessary police procedure, including their refusal to let the petitioner get hold of a smart mouthpiece and the refusal of the police officers to let a Brooklyn jerk tell them how to run their business.

The conviction in *Haley* v. *Ohio,* 332 U. S. 596, 92 L. Ed. 224, was reversed because the confession was obtained from a fifteen year old illiterate negro boy. The Court said: "A fifteen year old lad questioned through the dead of night by relays of police is a ready victim of inquisition. Mature men possibly might stand the ordeal from midnight to 5:00 A. M. but we cannot believe that a lad of tender years is a match for the police in such a contest." The Court was outraged over the fact that this young colored

boy was held incommunicado for three days after he confessed, during which time a lawyer retained to represent him was twice refused admission and his Mother was not allowed to see him, although a photographer was admitted at once.

The conviction in *Watts* v. *Indiana,* 338 U. S. 49, 93 L. Ed. 1801, was reversed because the confession was obtained after the prosecuting authorities had held the prisoner under their exclusive control without opportunities for sleep or decent allowances of food and he had been kept in solitary confinement in a cell described as a "hole" and had been interrogated by police officers in relays for five successive nights, as well as intermittently during the day.

The conviction in the case of *Harris* v. *S. C.,* 338 U. S. 68, 93 L. Ed. 1815, was reversed because the confession was obtained from the illiterate accused after interrogation for two days by a number of officers working in relays, relieving each other to permit respite from the stifling heat of the small room in which the questioning was conducted and after an officer had threatened to arrest his Mother for handling stolen property. Throughout the entire questioning he was denied the right to consult with his family and friends.

Some of the foregoing cases and others are discussed in an annotation following the reported decision of *Upshaw* v. *United States,* 335 U. S. 410, 13 L. Ed. 115. In the annotation, which is supported by copious citation of authorities, it is stated:

> "While neither as a matter of common or Federal law nor under the due process clause, is a confession rendered inadmissible as having been obtained by duress merely because made while the accused is in the custody of police officers questioning him, or is being told to tell the truth, or is not warned at the time that what he says may be used against him, or is handcuffed,

or under an accusation of having committed a capital offense, any of these factors may be taken into account in determining whether or not the statements of the prisoner were voluntary. Moreover, even events which occurred subsequent to the confession may properly be taken into consideration.

Delay in Committing Accused.

"In determining whether a confession is inadmissible in evidence at the trial of a criminal case the weight given by the Supreme Court to a delay on the part of the police in bringing the accused person before a committing magistrate varies according to whether the trial was had in Federal or in a state court.

"In a Federal Court delay on the part of the police in taking a person arrested before a committing magistrate or judicial officer in violation of Federal or state law seems, of itself, to render inadmissible a confession made while the accused was so detained, except in a situation in which it is obvious that the confession was in no way caused by such delay, as where it was made shortly after he was taken in custody.

"On the other hand, the effect of a petitioner's undue examination in violation of state criminal procedure is a matter of state, not of Federal, law. The mere denial of a prompt examining trial is not a denial of equal protection under the Fourteenth Amendment although it is a fact for consideration on an allegation that a confession used at the trial was coerced.

"Nonetheless, the fact that, in violation of state law, the accused was never given a preliminary hearing, or not during the period of interrogation, or that such hearing was improperly delayed until a confession was obtained, may be given weight as one of the factors which render a confession involuntary."

The Supreme Court has neither expressly or impliedly overruled or disapproved its holding in *Lisenba* v. *Cal.*, 314 U. S. 219, 86 L. Ed. 166, in which it was held that there was no denial of due process where a confession was made

after eleven days of detention. In that case there was evidence of physical mistreatment but it appeared that the confession was made only after the petitioner had been advised that statements of an alleged accomplice incriminated him.

The petitioner asserts, for the purpose of saving the questions in event a writ of certiorari is granted, that the trial Court erred in permitting (1) cross-examination of Mrs. York as to her statements to an officer (a) that she had threatened to report York to the police if he did not quit gambling with Taylor and (b) that if her husband was involved in a faked robbery it was because of Carlos Taylor (R. 293-4); and (2) rebuttal testimony by the officer that she made such statements. (R. 297).

The State respectfully insists that this cross-examination was competent for three reasons. First, Taylor admits he played cards with York in his home. (R. 248). Second, this testimony corroborates York's confession that he gambled with Taylor in his home and that Taylor suggested the faked holdup when York told him he could not afford to play poker. (R. 159). Third, it shows the previous connection between the defendants. *Defrese* v. *State,* 50 Tenn., 53, 64, *Woodruff* v. *State,* 164 Tenn., 530, 540.

Even if this testimony had been incompetent as to Taylor on the ground that it was hearsay its admission is not reversible error because no proper objection was interposed. The objections were upon the grounds that the testimony was not "competent, relevant or material." Under Tennessee practice the ground of the objection must be specific. *Troxell* v. *State,* 179 Tenn., 38, 384, *Patterson* v. *State,* 184 Tenn., 39, 45.

The only objection interposed on behalf of Taylor to Lt. Huddleston's testimony in rebuttal was that this was evidence in chief and for that reason inadmissible on re-

buttal. This is a matter of procedure which is well within the discretion of the trial Judge. *Waller* v. *State,* 178 Tenn., 509, 516, *Colbaugh* v. *State,* 188 Tenn., 103, 108.

Since Mrs. York denied making these statements it was competent to impeach her by testimony that she did make them. *Cole* v. *State,* 65 Tenn., 239, 241.

Conclusion

For the reasons stated, it is respectfully submitted that the petition for the writ of certiorari should be denied.

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(1845)